1993 DIESEL DESULFURIZATION

QUESTION AND ANSWER DOCUMENT

Washington, DC
August 5, 1993

PREFACE

This edition of the Diesel Desulfurization - Questions and Answers replaces the Diesel Desulfurization interim document issued on May 20, 1993 and responds to additional questions raised through approximately July 15, 1993 concerning the manner in which the United. States Environmental Protection Agency intends to implement and enforce the diesel desulfurization regulations at 40 CFR §§ 80 and 86. It was prepared by the Field Operations and Support Division of the Office of Mobile Sources, United States Environmental Protection Agency.

Regulated parties may use this document to aid in achieving compliance with the diesel Desulfurization regulations. However, it does not in any way alter the requirements of the diesel desulfurization regulations. While the answers provided in this document represent the Agency's interpretation and general plans for enforcement at this tune, some of the responses may be changed as additional information becomes available or as the Agency reconsiders certain issues.

We will attempt to respond to any additional questions on this subject. Please send any such questions in writing to Director, Field Operations and Support Division (6406J), United States Environmental Protection Agency, 401 M Street, S.W. Washington, D.C. 20460.

Mary T. Smith (Signature)
Director
Field Operations and Support Division

Washington, D.C.
August 5, 1993

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APPLICABILITY OF THE REGULATIONS

1. **Question:** What is the definition of diesel fuel?

Answer: "Diesel fuel means any fuel sold in any State and suitable for use in diesel motor vehicles and diesel motor vehicle engines, and which is commonly or commercially known or sold as diesel fuel." 40 CFR § 80.2(x).

2. **Question:** What is the definition of motor vehicle?

Answer: "The term 'motor vehicle' means any self-propelled vehicle designed for transporting persons or property on a street or highway." Clean Air Act § 216(2).

3. **Question:** Does the on-highway diesel fuel requirement extend to other fuels such as heating fuels, kerosene, jet fuel, and marine or railroad diesel?

Answer: Any petroleum distillate product, produced and distributed commercially or exclusively for the military, that is suitable for use in diesel motor vehicles or diesel motor vehicle engines will be treated as diesel fuel. This includes, but is not limited to, any diesel fuel, fuel oil, furnace oil, heating oil, kerosene, jet fuel, JP-4, JP-5, JP-8, marine diesel or railroad diesel that is suitable for use as a diesel motor vehicle fuel, or is suitable for blending with diesel motor vehicle fuel. Any such product should comply with the requirements for on-highway diesel, or, with the exception of the fuels listed below, must be dyed.

Certain fuel grades will be considered exempt from the dyeing requirement. First, EPA will not require that high sulfur jet fuel be dyed, because of the conflicting dyeing scheme used to distinguish between aviation gasoline and jet fuel. Under that scheme, aviation gasoline is dyed blue while jet fuel is undyed, in order to ensure that jet aircraft are not fueled with aviation gasoline, and that piston-driven aircraft are not fueled with jet fuel. EPA will not require that heavy petroleum distillate products be dyed. These heavier fuels are not suitable for dyeing, due to their normal dark

color, or suitable for use in on-highway diesel motor vehicles or on-highway diesel motor vehicle engines because of their high viscosity and instability. Heavy distillate products that will be exempt from the dyeing requirement are Fuel Oils Grades No. 4, No. 5, and No.6, Diesel Fuel Oil Grade No. 4-D, Marine Fuels Grades DMB, DMC, and RMA-10 through RML-55, and Gas Turbine Fuel Oils Grades No. 3-GT and No. 4 GT.

The exception for jet fuel is strictly limited to the dyeing requirement in 40 CFR § 80.29(b) to fuels maintained in a segregated distribution system and not available at any time for on-highway use. Any jet fuel or kerosene that is blended with diesel fuel, for use in diesel motor vehicles must meet the sulfur and cetane (or aromatic) requirements of 40 CFR § 80.29(a).

4. **Question:** May parties continue to blend jet fuel with diesel fuel for certain seasonal performance requirements?

Answer: EPA recognizes that it has been the practice in the industry to blend various jet fuels or kerosenes with diesel fuel, in order to improve diesel engine performance during certain times of the year. All regulated parties involved in the production, distribution or use of such blends must ensure that final products comply with the regulations. This may necessitate the use of a low sulfur jet fuel or kerosene, or the use of a very low sulfur diesel fuel to accommodate the blending of current jet fuels.

5. **Question:** Will off-highway users of diesel fuel such as farmers and construction site operations doing predominantly on-premise field work be required to use low sulfur diesel to transport equipment from Point A to Point B if on state, county, or federal roads and highways, or, to transport agricultural products from Point A to Point B prior to transfer to a second party?

Answer: These regulations apply to fuels used by motor vehicles. Diesel powered trucks and other equipment that meet the definition of motor vehicles are required to use low sulfur diesel fuel, even if used only in a farm or construction site setting.

6. **Question:** What are examples of vehicles or equipment that do not meet the definition of motor vehicle, and therefore are not required to use low-sulfur diesel fuel?

Answer: For the purpose of determining the applicability of the motor vehicle definition, Clean Air Act § 216(2), 40 CFR § 85.1703 states a vehicle which is self-propelled and capable of transporting a person or persons or any material or any permanently or temporarily affixed apparatus shall be deemed a motor vehicle, unless any one or more of the criteria set forth below are met, in which case the vehicle shall not be deemed a motor vehicle and excluded from the operation of the Act:

(1) The vehicle cannot exceed a maximum speed of 25 miles per hour over level, paved surfaces; or

(2) The vehicle lacks features customarily associated with safe and practical street or highway use, including, but not limited to, a reverse gear (except in the case of motorcycles) a differential, or safety features required by state and/or federal law; or

(3) The vehicle exhibits features which render its use on a street or highway unsafe, impractical, or highly unlikely, including, but not limited to, tracked road contact means, an inordinate size, or features ordinarily associated with military combat or tactical vehicles such as armor and/or weaponry.

Examples of vehicles which do not meet the motor vehicle definition include, but are not limited to, agricultural tractors, combines, backhoes, excavators, and bulldozers. EPA's Manufacturers Operations Division (MOD) makes determinations of the applicability of the Act's motor vehicle definition upon written request. MOD also maintains a list of vehicles that have been determined to be excluded from the motor vehicle definition.

That list or an exclusion determination may be obtained by writing MOD at:

Manufacturers Program Branch
Manufacturers Operations Division (6405J)
U.S. Environmental Protection Agency
Washington, D.C. 20460
(202) 233-9250

Requests for determinations of exclusion must contain, at a minimum, descriptions, dimensions and photographs or drawings of the vehicle.

Manufacturers often propose the use of speed limiting devices such as governors to meet the criterion at 85.1703(a)(1) described above. MOD evaluates governors for their permanence, likelihood of tampering and resistance to tampering.

Any person who modifies an excluded vehicle into a configuration that meets the definition of motor vehicle may be considered to be a manufacturer of new motor vehicles. The Clean Air Act provides for substantial civil penalties for the introduction into commerce of new motor vehicles that are not certified to comply with federal emission requirements.

7. **Question:** Do the regulations apply to all 50 states, U.S. possessions and territories?

Answer: The requirements of § 80.29 apply to all fifty states, U.S. possessions, and territories. Under Clean Air Act § 211(i)(4) the States of Alaska and Hawaii may petition for an exemption from these requirements, and such petitions may be filed under Clean Air Act § 325 on behalf of Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands. Thus far, only American Samoa has been granted a waiver. The state of Alaska has petitioned for a waiver and

EPA expects to act on this petition before October 1, 1993. In addition, on May 12, 1993, Guam submitted a waiver petition to the Agency.

8. **Question:** Would EPA consider an enforcement policy during the first month of the program that would, in effect, "stagger" enforcement down the distribution system?

Answer: All regulated parties will be expected to be in compliance on October 1, 1993 since the industry will have received over three years of lead time before the regulations go into effect. However, EPA recognizes that dyed high-sulfur diesel fuel may not be readily available until August. If a regulated party is able to demonstrate that it is customary to stock up on diesel fuel over the summer for fall and/or winter needs, EPA may exercise its enforcement discretion when clear high sulfur diesel fuel is discovered at a wholesale purchaser-consumer facility during October and November, 1993. The regulated party will have to demonstrate that storage of large quantities of high sulfur diesel is customary, that the undyed product was purchased prior to September 1, 1993, that this is the normal time of year that such product is purchased, and that the product is intended exclusively for off-highway purposes only. However, EPA will not “stagger" enforcement or use enforcement discretion regarding the sulfur and cetane or aromatics standards for on-highway diesel fuel.

TESTING AND SAMPLING METHODOLOGIES

9. Question: In its analysis of comments on testing of fuel sulfur levels (55 Federal Register 34130, August 21, 1990), EPA states that the Agency will use the ASTM D 2622 (Standard Test Method for Sulfur in Petroleum Products by X-Ray Spectrometry) test method for enforcement purposes. EPA received comments during the rulemaking that the equipment necessary to complete ASTM D 2622 is costly, and EPA should therefore allow use of ASTM D 4294 (Standard Test Method for Sulfur in Petroleum Products by Energy-Dispersive X-Ray Fluorescence Spectroscopy), which is essentially as accurate as ASTM D 2622 but costs significantly less. EPA decided that for the purposes of establishing a defense to an alleged violation for the sulfur percentage a regulated party may use D 4294, provided that the party has evidence from the manufacturer or others that it reliably produces results substantially equivalent to ASTM D 2622. What would EPA consider an appropriate methodology and/or documentation to validate an alternative analytical technique?

Answer: EPA intends to use the results of tests using D 2622 as the basis for enforcement of any sulfur content violations. In a case where a refiner or importer is presumed liable for a violation of the sulfur standard, one defense element is the results of tests on the product in question performed using D 2622. The regulations provide that an alternative sulfur test method is D 4294, provided that the refiner or importer is able to properly perform this test method, to support its data with a quality control plan, and has data from the

manufacturer or a qualified independent or in-house laboratory that the method reliably produces results substantially equivalent to the D 2622 method. Only methods D 2622 and D 4294 may satisfy a refiner's or importer's sulfur test result defense element.

If asked to support sulfur test results generated using the D 4294 method, a refiner or importer should be prepared to submit the following: a copy of the actual analytical procedure used; a copy of the quality assurance/quality control plan that was used by the laboratory and records demonstrating the actual conduct of this plan; records that describe the interferences to which the procedure used is subject, if any, and the corrections which were made to correct for any interferences that are present; and records which reflect that all standards were prepared in the same matrix as the sample in question. "Evidence from the manufacturer or others" to show equivalency of the D 4294 method with D 2622 would consist of a data correlation program conducted by an independent and impartial party in accordance with sound laboratory and engineering principles. This correlation program should include information and data regarding the preparation of samples, instrument calibration, quality control, and data analysis.

Parties other than refiners and importers may use sulfur test methods other than D 2622 or D 4294 in establishing a defense provided the party is able to demonstrate that the method was properly performed and correlated with the D 2622 method.

10. **Question:** Will EPA approve ASTM D 5186 in place of, or as an alternative to D 1319 for purposes of measuring the aromatic content of diesel fuel?

Answer: EPA has approved only ASTM method D 1319 for measuring the aromatic content of diesel fuel, and this is the only method that will be used by EPA for enforcement purposes. Refiners and importers are required by 40 CFR §§ 80.30(g)(2)(ii) and (g)(4)(i) to use method D 1319 when establishing a defense. Parties other than refiners and importers are free to use any test procedure for determining aromatic content when establishing a defense, so long as the procedure is approved by ASTM, and the procedure is performed properly and is correlated with method D 1319.

11. **Question**: Is EPA willing to participate in round-robin correlation programs? If so, how must regulated parties participating in such programs incorporate correlation results?

Answer: EPA is presently unable to participate in round-robin and correlation programs due to budget constraints.

12. **Question:** How will the upcoming ASTM round robin study for the proposed new ASTM DXXX test method for sulfur in petroleum products affect EPA's endorsement of D 2622?

Answer: If a new testing method for sulfur content is developed that, produces results equivalent to ASTM D 2622, EPA will consider adopting the new method as the approved method. Such a change would

be accomplished through rulemaking that would give all interested parties an opportunity to comment. Because notice and comment rulemaking is a lengthy process, however, EPA does not anticipate any changes in the near future.

13. **Question**: Is EPA aware of any other source of certified di-normal butyl sulfide other than Phillips Petroleum?

Answer: Phillips Petroleum is the only source of certified di-normal butyl sulfide (CH3(CH2)3-S-(CH2)3CH3) of which EPA is aware.

14. **Question:** Will EPA allow butyl sulfide as a substitute for di-normal butyl sulfide?

Answer: The D-2622 method specifies use of certified di-normal butyl sulfide. It is not the intention of EPA to require calibration using an unavailable standard material, however. It is EPA's interpretation that any similar sulfur containing hydrocarbon with a normal boiling point lying within the distillation range of diesel fuel may be used as a standard material, provided that the selected compound is of sufficient purity. A source of non-certified di-normal butyl sulfide is Aldrich Chemical Company.

15. **Question**: Will the EPA laboratory make any corrections for the difference in matrices between mineral oil and diesel fuel? If so, will EPA allow the use of NIST fuel oil standards in calibration, such as is allowed in ASTM D 4294?

Answer: D 2622 requires that calibration standards be prepared in white oil. EPA does not expect a shift in the result of the tests, provided that the API gravity of the white oil used is similar to the gravity of the fuel being tested. If a white oil cannot be found meeting this requirement, EPA believes it is satisfactory to substitute any sulfur-free petroleum-based oil with a distillation range similar to the diesel fuel being tested. EPA also encourages the use of the NIST sulfur in fuel oil Standard Reference Materials in verifying the accuracy of the test method. These NIST Standard Reference Materials may also be used for calibration. NIST standards may be purchased from:

National Institute of Standards and Technology (NIST)
Standard & Reference Materials Program Division
Customer Sales Office
Building 202, Room 204
Gaithersburg, MD 20899
Telephone: 301-975-6776
FAX: 301-948-3730

16. **Question:** How does a regulated party show equivalency with ASTM D 2622 when using on-line analyzers?

Answer: If the analyzer is hard plumbed into a pipeline, it is reasonable to pull a sample, for example, once per shift, and analyze

the sample on a laboratory version of ASTM C 4294 for an ongoing comparison. As with all ASTM D 4294 instruments, a sample should occasionally be checked against an ASTM D 2622 instrument. It is also advisable in such a situation to have an alternate inlet to allow an occasional NIST standard to be injected for further confidence.

EPA decided that for the purposes of establishing a defense to an alleged violation for the sulfur percentage, a regulated party may use D 4294, provided that the party has evidence from the manufacturer or others that it reliably produces results substantially equivalent to ASTM D 2622.

17. **Question:** What brand and type of equipment will EPA use in the field for determining the sulfur content, cetane index, and aromatics content in diesel fuel?

Answer: EPA is presently investigating the use of various types of field testing equipment for measuring sulfur content, cetane index and aromatic content. EPA has not selected any particular instruments at this time, but intends to do so in the near future.

TESTING TOLERANCE

18. **Question:** What is the maximum measured sulfur content that EPA plans to allow, above which possible enforcement action may be taken?

Answer: As a matter of enforcement discretion, EPA will take enforcement action only when its diesel sulfur test results are 0.055 weight percent or greater.

19. **Question**: Can test reproducibility for sulfur content of highway diesel fuel be handled in a manner similar to that for gasoline vapor pressure, whereby the pipeline may average its test result with that of the refiner's. For example, a refiner tests a batch of diesel fuel to be below 0.05 weight percent and transfers the product to a pipeline; the pipeline tests the fuel with a result that is greater than 0.05 weight percent. If the average of the two tests is equal to or less than 0.05 weight percent, can the shipment be accepted by the pipeline?

Answer: If any party downstream of the refiner/importer facility, including a pipeline, tests the sulfur content of diesel fuel to be 0.055 weight percent or greater, the product should be considered in violation of the diesel sulfur standard, regardless of any contradictory test results by the refiner.

20. **Question:** The regulations state that on-highway diesel must be 0.05 weight percent sulfur maximum and meet either the 40 cetane index minimum or 35 volume percent aromatic maximum. Assuming one

batch meets the sulfur maximum and cetane index minimum, and another batch meets the sulfur and aromatic maximum, it is conceivable that a blend of two complying fuels will not meet the cetane index minimum or the aromatic maximum. Will EPA allow mixtures of complying batches?

Answer: EPA is aware of the theoretical potential that when two complying batches of diesel sulfur fuel are combined, the resulting mixture might not meet all applicable standards for diesel fuel. EPA believes there is small likelihood that such mixtures will in fact occur. Only certain mixtures of diesel fuel produced to the cetane standard and diesel fuel produced to the aromatic standard will yield this antagonistic result, and the volume of diesel fuel that will be produced to the aromatic standard likely will be very small.

In the case where diesel fuel is discovered that violates the aromatic and cetane standard, it is a violation of the regulations. However, EPA may exercise its enforcement discretion and not pursue an enforcement action where the responsible party clearly demonstrates that the violation is the result of mixing diesel fuel that met the standards for cetane with diesel fuel that met the standard for aromatic content. Furthermore, EPA does not believe there would be a significant environmental impact resulting from such a mixture as there clearly is under the volatility regulations when 10% ethanol gasoline is blended with clear gasoline.

21. **Question:** What is the minimum measured cetane index that EPA plans to allow, below which possible enforcement action may be taken?

Answer: As a matter of enforcement discretion, EPA will take enforcement action only as a result of a calculated cetane index of less than 39.5.

22. **Question**: Many refiners blend a chemical additive into diesel fuel to improve the fuel's cetane rating. The use of such additives does not change the calculated cetane index. Would EPA consider a modification to the diesel regulations to adjust the cetane index for the purpose of compliance with minimum cetane index requirement to recognize use of such cetane improvers?

Answer: EPA will evaluate compliance with the diesel sulfur cetane requirement only using the methodology specified in 40 CFR § 80.2(w).

DYEING OF DIESEL FUEL

23. **Question:** Is 1 ,4 - dialkylamino-anthraquinone the only blue dye that is approved for use?

Answer: Yes

24. **Question:** Is there a minimum blue dye concentration required, or is there a recommended concentration?

Answer: EPA will not recommend specific dye concentrations to be used. Regulated parties bear the burden of adding sufficient dye to accomplish the goal of the dyeing program or risk fuel being tested as on highway fuel. Some darker colored fuels may require that additional dye be added in order for the dye to be visible. Any diesel fuel which does not show visible evidence of being dyed will be considered to be available for use on-highway, and subject to the regulations.

25. **Question:** Since some high sulfur diesel has a yellow-like color, blue dye will produce a green tint in some high sulfur diesel. Will this color be recognized as visible evidence of the presence of blue dye?

Answer: EPA is aware that the specific dye required by the regulations will not normally be blue after being added to some diesel fuels. Due to its characteristic yellowish color, diesel fuel will often appear green after being dyed. Therefore EPA will consider such product as having been dyed, absent any indication to the contrary.

26. **Question:** Import terminal operators frequently receive un-dyed, high-sulfur diesel fuel from abroad. At what point must the required dye be added?

Answer: Importer facilities must add the required dye to the non-complying, high-sulfur diesel fuel before it is introduced into commerce. Thus, the dye may be added to the high-sulfur diesel fuel at the truck rack if one is available or prior to release if it is to be sold in bulk. Before the dye is added, importer facilities should also label the fuel as high sulfur, not for on-highway use and have available documentation to substantiate that the high-sulfur diesel fuel did not leave the facility without being dyed.

27. **Question:** Will high sulfur diesel loaded for shipment to non-U.S. locations require dye?

Answer: EPA will assume that all diesel fuel found in the United States is intended for domestic sale and is subject to the requirements of 40 CFR § 80.29. However, EPA will exercise enforcement discretion for diesel fuel that is clearly intended for export only, provided that the product is segregated, is clearly marked as product for export only that does not comply with federal motor vehicle diesel fuel standards, and supporting documentation substantiates it is for export only. This exception would not apply if any of the fuel in question is in fact being sold or offered for sale, supplied or offered for supply, or is dispensed in any U.S. marketplace.

28. **Question**: If a low sulfur highway diesel fuel is accidentally dyed blue, can it still be sold as low sulfur if the sulfur level is documented? What if low sulfur diesel fuel is accidentally mixed or contaminated with high sulfur diesel fuel and the blend is found to still be less than 0.05 weight percent sulfur? What procedure must

be followed to recertify as a low sulfur diesel fuel?

Answer: Although the presence of dyed fuel will be an indicator of off-highway, or potentially non-complying diesel fuel, it will not be the basis for enforcement action if the presence of the dye is inadvertent. Enforcement will be based on actual analysis of diesel fuel samples for compliance with the applicable requirements according to the ASTM test methods specified in the regulations. Thus, for example, even if diesel fuel being sold or offered for sale for use in motor vehicles contains some visible evidence of the blue dye as a result o£ commingling dyed and non-dyed product, the fuel will not be in violation if it otherwise complies with the regulations. It is incumbent upon each party in the distribution system to ensure that any on-highway diesel fuel meets the applicable requirements.

29. **Question:** If off-road diesel must be dyed blue, may on-road diesel be dyed any color except blue?

Answer: Assuming that the on-road fuel complies with the sulfur percentage and cetane index requirements, the practice of adding any color dye that would not be confused with blue would not be prohibited. In any case, any alleged violations will be based on sulfur and cetane analysis, not on color.

30. **Question:** Certain fuel suppliers currently market an on-highway diesel fuel which is dyed green. Can this product continue to be marketed under the regulations?

Answer: As stated previously, enforcement of the on-highway fuel requirements will be based on tests to determine compliance with the sulfur and cetane or aromatics standards and not fuel color. Since the dye requirement is intended to identify non-complying product for downstream purchasers, it is up to the suppliers and their customers to determine whether or not to market this product.

31. **Question:** If low sulfur diesel fuel is intended to be used for off-highway purposes only, may it be dyed blue despite the fact that it complies with the standards?

Answer: Yes.

32. **Question:** Does heating fuel or furnace oil which meets commercial specifications for those products but does not meet specifications for diesel fuel as defined in the regulations need to be dyed blue?

Answer: Any heating fuel or furnace oil that is suitable for use as a fuel for diesel motor vehicles will be considered a diesel fuel, and subject to the requirements of 40 CFR § 80.29, and if high sulfur must be dyed.

33. **Question:** Does high sulfur diesel fuel for railroads need to be dyed blue if it does not meet the specifications for diesel fuel as

defined in the regulations?

Answer: Any railroad diesel fuel that is suitable for use as a fuel for diesel motor vehicles will be considered a diesel fuel, and subject to the requirements of 40 CFR § 80.29, and if high sulfur must be dyed.

34. **Question:** Does marine diesel fuel need to be dyed if it does not meet the specifications for diesel fuel as defined in the regulations?

Answer: Any marine diesel fuel that is suitable for use as a fuel for diesel motor vehicles will be considered a diesel fuel, and subject to the requirements of 40 CFR 80.29, and if high sulfur must be dyed.

35. **Question:** Does high-sulfur kerosene or Jet-A have to be dyed if intended for use as a jet fuel?

Answer: High-sulfur kerosene or Jet-A will not have to be dyed provided that: 1) the fuel meets the specification for jet fuel; 2) the fuel is supplied to a customer as jet fuel; 3) it is reasonable for the supplier to believe the customer has a need for jet fuel; and 4) the supplier has no reason to believe the customer is using the fuel for use in diesel motor vehicles. If any of the above are not met, then any party that supplies, transfers or offers for sale, kerosene or Jet-A could potentially be liable if EPA discovers such un-dyed high sulfur product available for use in diesel motor vehicles.

36. **Question:** Does high-sulfur kerosene or Jet-A, that meets the specification for jet fuel, have to be dyed if used for purposes other than as a jet fuel?

Answer: Since kerosene and Jet-A are clearly suitable for use in diesel motor vehicles, they are subject to the regulations and, with the exception for jet fuel use as described above, should meet the regulatory requirements, or be dyed. High-sulfur kerosene or Jet-A that meets the specification for jet fuel, will be allowed to remain undyed provided that: 1) the fuel is delivered to end users for aviation purposes; or 2) the fuel was part of a fungible batch with published specifications, and parts of the fungible batch are delivered to end users for aviation purposes.

Each party in the distribution chain will be held responsible for obtaining reasonable assurance that there is a valid downstream market for aviation fuel, which permits the fuel to remain undyed. **At the first level in the distribution system that there are no longer any aviation destinations out of a common stream, the dye must be added.**

For example, a refiner transporting high-sulfur kerosene or Jet-A in a pipeline, which meets specifications for jet fuel, intended for use as a jet fuel and other non-highway purposes, would not have to dye the fuel. The terminal receiving the fuel would dye the fuel upon receipt if there were no aviation customers. In the case of pipelines,

product in a fungible batch meeting the specifications for jet fuel would not have to be dyed. Terminals receiving this fungible product would have to add dye into the tank unless they have aviation users loading at their racks. In that case, terminals would have to dye at the rack all non-aviation loads and have documentation available upon inspection which demonstrate controls and procedures used for loading the product.

In any of the above cases, any undyed high-sulfur kerosene or Jet-A should AT ALL TIMES be segregated from any low-sulfur diesel fuel used on-highway and supported by appropriate documentation that clearly demonstrates that its intended use is as an off-highway fuel that does not comply with the regulations.

37. **Question:** Diesel fuels sometimes are blended with kerosene or jet fuel for use in extremely cold areas. If inadequate supplies of low sulfur kerosene exist, will an allowance be made for the use of 51 grade (0.12 weight percent sulfur) kerosene in diesel fuel blending?

Answer: Any blends of kerosene or jet fuel and diesel fuel will be considered diesel fuel, as defined in 40 CFR 80.2(x), and will be subject to the requirements of 40 CFR § 80.29. No exceptions will be made for diesel fuel used in cold climates.

38. **Question:** If a regulated party purchases kerosene and uses it in its bus fleet, is it a violation if the kerosene is above the 0.05% sulfur limit? Is the supplier liable for the misuse of the product?

Answer: Kerosene that is used as a fuel for buses, which are diesel motor vehicles, is considered diesel fuel that must meet the requirements of 40 CFR §80.29. Use of high sulfur kerosene to fuel buses would constitute a violation of the diesel sulfur requirement, for which the fleet operator and the supplier would be presumed liable.

39. **Question:** In all instances where compliance fuel contains some 1,4 -dialkylamino-anthraquinone dye, is this to be reported in the EPA "Fuel Manufacturers Quarterly Report for Motor Vehicle Diesel Fuel?”

Answer: Any low sulfur diesel fuel that is inadvertently dyed with 1, 4 dialkylamino-anthraquinone should have already been included in the overall low sulfur, on-highway diesel fuel production figures that are reported to EPA each quarter.

40. **Question:** Are properly coded blendstocks and/or feedstocks moving between refineries (that meet diesel fuel specifications except for sulfur) required to be dyed?

Answer: Non-complying distillate intermediates and distillate blendstocks that are ONLY transported between refineries for further processing do not have to be dyed provided the product will be segregated and documented throughout the distribution system as being an intermediate or blendstock, not a finished fuel and not suitable for use on-highway. The following restrictions apply:

(A) The source location and the ultimate destination must both be refineries.
(B) The product must be shipped segregated.
(C) The pipeline product codes must identify the material as unfinished distillate intermediate or distillate blendstock, which is not suitable for on-highway diesel use (e.g., "Unfinished distillate - not suitable for sale or use as an on-highway diesel fuel"). Product codes for intermediates and distillate blendstocks must be distinctively different from current finished middle distillate codes.

(D) If the product is delivered into holding tanks for further shipment, it must not be available to a truck loading rack. The responsibility for making sure that this does not happen would rest with the owner of the product and holding tanks.

LIABILITY AND DEFENSES

41. **Question:** Where one refiner supplies diesel fuel to its branded retail outlet which was obtained in exchange from a terminal operated by another refiner, and a violation is detected at the retail outlet, who is liable?

Answer: The regulations provide for presumptive liability on the part of both parties to the exchange, one party as the "branded" refiner and the other as a distributor.

42. **Question:** For violations found at branded or unbranded distributor facilities, will EPA seek to hold liable only the distributor in custody of the product at the time of the violation or will all distributors in the prior chain of title be considered vicariously liable?

Answer: All distributors will be presumed liable.

43. **Question**: For violations found at branded or unbranded retail outlets or wholesale-purchaser consumer facilities, will EPA presume liable all distributors in the prior chain of title to that product?

Answer: Yes, all parties in distribution are presumed liable.

44. **Question:** In a situation where a violation is detected at a branded retail outlet which is supplied from a branded distributor which, in turn, receives diesel fuel through a pipeline which transports the commingled product of the refiner whose brand appears, plus one or more other refiners, are all the refiners liable? How could the refiners establish a defense?

Answer: The refiner whose brand name appears at the retail outlet would be liable. In order to establish a defense, it would have to show each of the elements of the refiner's branded facility defense in 40 CFR § 80.30(g)(4). The other refiner(s) whose commingled product was delivered to the retail outlet may be liable if they meet the

definition of another regulated party (e.g. distributor).

45. **Question:** If a violation is found at a terminal where the terminal operator does not own the diesel fuel, who would be liable?

Answer: The owner or operator of a terminal which stores diesel fuel without taking title to or otherwise owning the fuel and without altering either the quality or the quantity of the fuel, is defined by the regulations as a "carrier" (see 40 CFR §80.2(t)). As a carrier, this party would be presumed liable because the high sulfur diesel fuel was found at that carrier's facility. In addition, the refiner or importer who produced or imported the diesel fuel would be presumed liable.

46. **Question**: What should a carrier do if it would be in breach of a contract with the company supplying the product by refusing to transport or store product that does not meet the standard?

Answer: Where high sulfur diesel fuel is found at a carrier facility (including a terminal which does not take title to the product), the carrier is presumed liable for violating the regulations. We believe carriers can, and should, negotiate contracts which are drafted in such a way that the carrier is not obligated to transport or store product in violation of the regulations.

47. **Question**: In a case where more than one party is presumed liable for a violation, and more than one of the parties is unable to establish a defense, is each party liable for a separate penalty?

Answer: Each party who is liable for a violation, and who is unable to establish a defense, is liable for a separate penalty.

48. **Question:** What documentation is needed to prove that a diesel fuel is not intended for highway use?

Answer: Any diesel fuel that is not dyed blue will be considered to be available for use in diesel motor vehicles and motor vehicle engines and subject to the provisions of 40 CFR 80.29(a). In the case of diesel fuel that does not meet the on-highway standards and is dyed blue, it is also prudent to retain commercial documentation such as invoices and bills of lading that indicate the diesel fuel is "for off-highway use" only and that the product is only being sold to customers for non-highway use.

49. **Question:** What kind of documentation or other evidence must a party provide to establish that it (or its employees or agents) did not cause a violation?

Answer: All factors cannot be listed because factual circumstances differ and because EPA cannot anticipate all the types of evidence that may show non-causation. For all parties, however, in meeting the non-causation portion of their defense, the regulations provide that the party must show, by reasonably specific showings, by direct or circumstantial evidence, that the party (or the party's

employee or agent) did not cause the violation. In many instances the cause of the violation will be evident from the inspection results and related documentation.

In the case of a refiner or importer, providing results of the sampling and testing of the diesel fuel in question, conducted in accordance with the approved test methods, before it left the refinery or importer's facility would be a strong factor in determining whether the refiner or importer caused the violation. However, because the refiner or importer could have caused the violation despite acceptable test results, additional evidence may be required. For example, a refiner could ship to its own downstream terminal two products with different sulfur levels intended for different purposes. If these products become commingled after leaving the refinery, the product intended for low sulfur use could be out of compliance. The refiner thus could have caused this violation even though the product was in compliance when it left the refinery.

For distributors, resellers, and carriers, the best evidence to show they did not cause the violation is evidence of who caused the violation and how. Other strong evidence would be test results showing the particular fuel in question met the standards when it was delivered from these parties to the next person in the distribution chain. Evidence consisting of the other defense elements (e.g., receipt of product which was-in compliance, an oversight program (as discussed in greater detail in the next question) with periodic test results, etc.) would assist in showing the violation must have been caused by another, but this is not necessarily conclusive. Where no cause can be established for a violation, and no person in the distribution chain will accept responsibility, the showing necessary for each person in the chain to establish it did not cause the violation will be more difficult.

It is not sufficient for a distributor to show that it did not handle the diesel fuel, because there are ways to cause a violation without actually touching the fuel (e.g., by misrouting high sulfur diesel fuel to a location where it is ultimately used in a motor vehicle). Moreover, other elements of the defense still must be met.

In the case of a retailer, the following types of evidence are examples of relevant factors relating to whether the retailer caused a violation:

1) records evidencing whether or not all diesel fuel purchased by the retailer complied with the standard;

2) any evidence regarding whether the retailer knew or had reason to believe that the diesel fuel did not meet the standard; e.g. the fuel sold at the station is dyed blue;

3) any evidence regarding alteration of diesel fuel stored in his tanks by the retailer;

4) any evidence that the retailer may have received fuel from

another supplier(s).

50. **Question:** What criteria will EPA use to evaluate oversight programs; is sampling and testing required, and if so how much? What type of service station monitoring is considered acceptable? Is there a minimum percentage of shipments which must be tested? What constitutes an acceptable oversight program for a diesel manufacturer supplying (1) branded jobbers selling under that manufacturer's brand, (2) another independent or unbranded jobber? As part of its oversight program, must a branded refiner perform periodic sampling and testing at their non-owned terminals which supply the branded refiner's dealers pursuant to an exchange agreement, where the non-owned terminals carry out their own periodic sampling and testing program? Is a retail sampling program required for an adequate defense against an incident of noncompliance at a branded retail outlet? If so, what is an adequate retail sampling program? Please detail oversight responsibilities for jobbers.

Answer: For a distributor, reseller or corner (when the violation is found at the carrier facility) to establish a defense, these parties must show (in addition to other elements) an oversight program such as periodic sampling and testing to monitor the product being sold, supplied, or transported by that party. This program would thus monitor the quality of product in the possession or ownership of the party, and not of product which has passed downstream. The diesel regulations do not require that an oversight program consist of sampling and testing, but EPA is not aware of an effective oversight program which would not include some periodic sampling and testing.

The frequency of periodic testing which would satisfy this requirement will depend upon several factors, including the following: a) the results of previous sampling; b) the volume of product in a particular batch (the larger the volume, the greater the justification for sampling and testing that batch); c) the degree of confidence in the quality of the product which was received; and d) the opportunity for increased sulfur content while the product is in the possession of the party (e.g., higher sulfur product present which could be commingled).

In the case of refiners, two types of sampling and testing are required (in addition to other requirements) in order to establish a defense where a violation is found downstream and they are presumed liable. The refiner is required to show through the approved sampling and testing methodologies that the diesel fuel in question was in compliance with the standard when transported from the refinery. This generally would require that all product be tested. In addition, when the violation is found at a branded facility downstream, the refiner also must show a quality assurance prog ram at its downstream branded at it downstream branded facilities, such program to include periodic sampling and testing. The frequency of periodic sampling and testing which would satisfy this requirement will depend upon factors such as the following: a) the volume of product being handled at a particular facility; b) the opportunity for violations to occur (e.g., the

presence of high sulfur product which could cause a violation through commingling); c) the results of previous sampling at that facility and at facilities upstream and downstream from the facility found in violation; d) there is reason to believe the downstream facilities may not be in compliance with the contractually imposed requirements designed to prevent violations; and e) the results of sampling and testing in the market area where the violation occurred. A branded refiner may use other parties to conduct periodic sampling and testing downstream. However, if the branded refiner is to meet the oversight portion of its defense, it can not simply rely on another party's oversight; the refiner must have an appropriate contract with the party and maintain oversight with regard to that party's program. If the other party's sampling or testing is inadequate, the branded refiner will not be able to meet its defense.

51. **Question:** What must a refiner do to meet the "contract defense," as set forth in 40 CFR § 80.30(g)(4)

Answer: The defenses set forth in 40 CFR § 80.30(g)(4) relate to violations discovered at branded distributor or reseller facilities (40 CFR § 80.30(c)) and at branded retail outlets and wholesale purchaser-consumer facilities (40 CFR § 80.30(e)).

In such cases the refiner must meet all the elements of the defense in 40 CER §§ 80.30(g)(4)(i) and (ii), and must meet one of the additional elements in 40 CFR § 80.30(g)(4)(iii).

First, the refiner must demonstrate the existence of a contract with the appropriate entity. This contract must have been designed to prevent the specific circumstances which caused the particular violation.

Second, there must be an adequate oversight program, such as periodic sampling and testing, to ensure compliance with the contractual obligation. This oversight defense element has been discussed in response to other questions in this section.

With regard to the contract itself, we feel it is inappropriate for EPA to set forth specific requirements regarding the necessary provisions of such contracts. Rather, such contracts will be evaluated on a case-by-case basis. However, the following is a partial list of broad areas that a contract should address:

1) The amount of sampling and testing that must be done by the entity with whom the contract is in place (e.g., distributor).

2) Specific procedures and other specific requirements to ensure that high sulfur diesel fuel or blendstock is not commingled with low sulfur diesel fuel. The specific requirements must be aimed at the circumstances as they exist with each entity. They must be more than mere recitals that the entity must avoid violating the diesel regulations.

3) Required training regarding the regulations, product handling

and any other procedures and requirements outlined in the contract to prevent violations.

4) Appropriate responses if diesel fuel having excessive sulfur or an insufficient cetane index is identified by periodic sampling and testing or by any other means, including (where appropriate) reporting, corrective actions, steps to prevent future violations, steps to identify the cause of the violation, resampling and testing, increased sampling and testing, retraining, etc.

5) Appropriate responses if it is discovered that a person with whom a contract is in place is not in compliance with the contract provisions. Such responses should include affirmative actions which are reasonably calculated to compel the person to comply with the contract provisions.

52. **Question**: How long will records have to be saved?

Answer: The regulations do not mandate record retention. However, it is in the regulated party's best interests to maintain records for five years in case it becomes necessary to establish a defense if a violation is discovered.

53. **Question:** How long must regulated parties retain diesel samples taken in conjunction with an oversight program?

Answer: The Agency's policy with regard to sample retention has not changed. As in the past, the Agency will evaluate the adequacy of a refiner's test data and any party's oversight program on the basis of records of sampling and testing, rather than by evaluation of samples of diesel. A retained sample could conceivably be useful in resolving a discrepancy between a company's and EPA's test results.

54. **Question:** Can a party rely on tests done by another party or by an independent laboratory? Will a third party company assume any liability if their actions lead to violations?

Answer: Under certain circumstances tests performed by another party or laboratory may be acceptable, especially where the reliability of the tests is high (e.g., where a carrier contracts to have a supplier sample and test product immediately after delivery). Liability is not transferred to the third party who conducts the tests, however; the burden remains on the regulated party to demonstrate that any testing is performed in accordance with the regulatory requirements, and that sampling methods and frequency are adequate.

55. **Question**: Among the defenses available to a carrier found to be in violation is the ability to provide "any other evidence that shows that care was taken to avoid blending the diesel fuel with anything which would change its cetane index or sulfur percentage". What, in EPA's view, might constitute such evidence? For example, would copies of field operating instructions requiring operators to make "clean" pipeline cuts constitute such evidence? What about clearly

stated product codes requiring shippers to ship only complying fuel (i.e., max. .05% sulfur, min 40 cetane only) under a specified product code reserved solely for on-highway diesel?

Answer: The two examples of evidence given in the above question would constitute evidence which would be relevant to a carrier's defense. Other examples of steps a carrier can take to ensure the quality of diesel fuel in its possession include the following: contractual agreements between the carrier and other parties that include requirements that are designed to preserve the quality of diesel fuel; and product handling procedures that are reasonably calculated to preserve the integrity of diesel fuel, together with employee training on the procedures and measures to ensure the procedures are followed. EPA looks at these matters on a case-by-case basis.

56. **Question:** What must a diesel fuel retailer do to establish a defense against presumptive liability if non-complying fuel is detected at a retail outlet?

Answer: In a case where high sulfur diesel is discovered at a retail outlet, the retailer must show it did not cause the violation in order to establish a defense. If the diesel fuel is dyed blue, the retailer will normally not be able to escape liability, because it is incumbent upon a retailer to check the color of any diesel fuel that is delivered (or of the fuel in the storage tank following delivery of new product). If the violating diesel fuel is not dyed blue, the retail outlet would be expected to have bills of lading that represent all of the diesel in the storage tank, and that represent that the diesel fuel complies with the standards.

57. **Question**: If a retailer also owns/operates a bulk plant for heating oil (but does not supply the retail outlet from the bulk plant), does this place any additional burden on the retailer to establish a defense against presumptive liability for a violation at a retail outlet?

Answer: Since this situation creates a significant potential for violations, the retailer should maintain thorough records to demonstrate that the heating oil is not being supplied or offered for sale for on-highway use.

58. **Question:** Is it necessary for regulated parties to keep pipeline tickets, bills of lading and other pertinent documents on shipments of high-sulfur jet fuel and kerosene, which could be blended into diesel fuel?

Answer: EPA does not mandate any specific record retention. In establishing a defense, however, a regulated party should have documents available to demonstrate compliance, particularly regarding the destination of any high-sulfur products which could be used as diesel fuel. It would also be important for any high sulfur fuel shipping documents to clearly state "for off-highway use only."

59. **Question:** If EPA determines that noncomplying fuel has been sold, but cannot determine the number of sale transactions, how will EPA determine the number of violations?

Answer: EPA is in the process of developing a penalty policy for these regulations, which will likely consider similar factors as provided in the RVP penalty policy.

60. **Question:** Are there any additional measures that a distributor can take (beyond sampling and testing and certifications on each bill of lading) to strengthen its defense if a retail outlet is found to be selling high sulfur diesel at motor vehicle diesel pumps?

Answer: If it is determined that a distributor provided high sulfur fuel to a motor vehicle diesel pump where a violation is discovered, then there is no defense that would absolve the distributor of liability. However, other distributors or terminals that supply fuel to that retailer are also potentially liable. For those parties ensuring that all high sulfur diesel fuel that leaves a terminal is dyed blue, so that downstream parties can visibly identify non-complying diesel fuel and marking all high sulfur product delivery documents as “off-highway use only" will further strengthen a defense if a violation is alleged. In addition, distributors should routinely review invoices and bills of lading to identify any suspect deliveries that might result in high-sulfur fuel being used on-highway and take appropriate actions if violations seem likely.

61. **Question:** What should a distributor do if a retailer wishes to purchase off-highway diesel fuel?

Answer: If a retail outlet requests delivery of off-highway diesel, the distributor should deliver the product only if the retailer has a legitimate need for off-highway fuel and the retailer has procedures in place to prevent off-highway diesel fuel from being used in motor vehicles. The primary means of preventing misfueling violations would be to ensure that the pumps dispensing high sulfur product are clearly labeled for off-highway use only or display appropriate warnings regarding the federal prohibition for misfueling diesel motor vehicles. In addition, any off-highway diesel should be dyed and the product transfer document should clearly identify the product as "off-highway fuel, not legal for motor vehicle use.” If the above are not in place, the distributor would be risking liability for misfueling if EPA discovers a violation.

MISFUELING

62. **Question:** How does EPA plan to enforce the misfueling prohibition?

Answer: EPA will enforce the misfueling prohibition primarily through inspections at retail outlets and wholesale purchaser-consumer facilities, samples from vehicles, and records checks at wholesale purchaser-consumer facilities.

63. **Question:** In a case where a wholesale purchaser-consumer uses high sulfur diesel to fuel motor vehicles, who would be liable for this violation?

Answer: The use of diesel fuel that does not meet the on-highway standard to fuel a motor vehicle is prohibited by 40 CFR § 80.29(a), which states that no person may dispense any diesel fuel for use in motor vehicles unless the fuel meets the on-highway standards. In addition, diesel misfueling is specifically prohibited by Clean Air Act § 211(g), which provides as follows:

Beginning October 1, 1993, no person shall introduce or cause or allow the introduction into any motor vehicle of diesel fuel which such person knows or should know contains a concentration of sulfur in excess of 0.05 percent (by weight) or which fails to meet a cetane index minimum of 40 or such equivalent alternative aromatic level as prescribed by the Administrator....

In a case where diesel fuel that does not meet the requirements of 40 CFR § 80.29 is used by a wholesale purchaser-consumer (WPC) or its employee to fuel a motor vehicle, this party would be liable for the violation. The only possible defense would be proof that the WPC ordered and paid for on-highway diesel fuel, but the distributor instead delivered un-dyed high sulfur diesel fuel which was documented as on-highway diesel fuel.

If the WPC's employee knowingly misfueled a motor vehicle with high sulfur diesel, that employee also would be individually liable.

In such a WPC misfueling case, the diesel fuel distributor or reseller might also be liable for a misfueling violation. In order to establish a defense, the distributor or reseller would be required to show it did not cause the violation. EPA believes the distributor or reseller would be unable to establish this "did not cause" defense element if the distributor or reseller either knew, or should have known that the WPC was misfueling, yet failed to take reasonable steps to stop the violations.

For example, a distributor would know, or should know, that misfueling violations are occurring if the distributor, or its employee, actually sees motor vehicles being fueled from the WPC's pump that is supplied with high sulfur diesel by the distributor. Similarly, in a case where a distributor has historically supplied a WPC with diesel fuel used to fuel fleet motor vehicles, such as a bus fleet, and subsequent to October 1, 1993 the WPC orders a similar volume of high sulfur diesel, the distributor would, or should, know of the high potential for misfueling violations.

In the situation where a distributor or reseller knows or should know of an occasional misfueling by a WPC, it would be reasonable for the distributor or reseller to inform the WPC of the violations. A pattern of misfueling violations might require the distributor to refuse to supply high sulfur fuel to the WPC until appropriate assurances are made and measures are undertaken to ensure misfueling

violations will not recur.

The same responsibilities would apply to a truck carrier that supplies high sulfur diesel to a WPC, where the carrier knows or should know of misfueling violations.

64. **Question:** What penalties will be sought for misfueling violations?

Answer: The Clean Air Act specifies a penalty of up to $25,000 per day per violation plus any economic benefit or savings resulting from the violation(s). EPA is in the process of developing a penalty policy which will specify the proposed penalties for various types of violations, including misfueling.

65. **Question:** Must retail pumps be labeled at facilities that carry both low-sulfur and high-sulfur diesel products?

Answer: If a retailer elects to sell both low-sulfur and high-sulfur diesel fuel, the retailer must be particularly careful because of the heightened chance of misfueling, and the resulting exposure to liability. While the regulations do not mandate pump labeling, it normally would be essential to avoid misfueling. Other steps include, but are not limited to, selling high-sulfur diesel fuel from part of the station different from other fuels and monitoring of each sale that takes place. EPA believes that it would be very difficult for a retailer to establish any defense against liability for a misfueling violation that occurs from an "off-highway" pump at the retailer's facility.

In addition, a distributor that delivers high sulfur diesel fuel into a retail outlet storage tank that supplies a pump not properly labeled would be liable for misfueling violations that occur at that pump.

66. **Question:** May persons other than retailers, wholesale purchaser-consumers, distributors, resellers, carriers, and refiners be held liable for misfueling motor vehicles with high sulfur diesel fuel.

Answer: Section 211(g) of the Clean Air Act prohibits <u>any</u> person from introducing into a motor vehicle diesel fuel which the person knows or should know does not meet the on-highway diesel standards. As a result, any individual who fuels a motor vehicle from a pump that is labeled as containing off-highway diesel, or who otherwise should know the fuel is off-highway diesel, would be liable. For example, this prohibition clearly would apply to operators of motor vehicles or trucks.

67. **Question**: Are there any implications for Canadian or Mexican based trucks entering the U.S. with non-U.S. grade diesel fuel?

Answer: As long as the vehicle entering the United States is only being powered by high sulfur diesel fuel purchased outside the United States, there will be no liability. However, if high sulfur

diesel fuel is being transported for any of the purposes outlined in the regulations, then that person/entity must comply with the regulations.

68. **Question:** Since foreign based trucks are registered out of the United States, will these trucks be able to refuel in the United States using non-highway grades of fuel?

Answer: No.

69. **Question**: If a U.S. based truck delivering goods into Canada purchases non-U.S. grade diesel fuel in Canada, and then returns to the U.S. with that fuel in his tank, will he be subject to the misfueling provisions outlined in the final rule?

Answer: The purchase of non-U.S. grade diesel fuel in Canada by a U.S. based truck and used by the same truck in order to return to the U.S. is not a violation of the misfueling provisions of 40 CFR § 80.29 and Clean Air Act § 211(g)(2). However, the introduction of high-sulfur diesel fuel could void the manufacturer's warranty.

70. **Question:** Will EPA be primarily taking samples from on-road diesel vehicles for enforcement purposes?

Answer: EPA will be collecting samples from all regulated parties that supply or use diesel fuel, however, the specifics of EPA's enforcement strategy have not yet been mapped out.

INSPECTIONS

71. **Question**: Where will EPA focus its enforcement efforts; how will EPA target particular facilities for inspection; and who will conduct EPA sampling?

Answer: EPA conducts inspections at all regulated facilities; including refineries, terminals, WPCs, retail outlets and trucks. Inspections are conducted primarily by authorized contractor personnel and EPA staff on a random basis, however, inspectors will respond to complaints that suggest a violation.

72. **Question:** Will EPA conduct audits of upstream facilities, including pipeline terminals? Will refineries be audited first?

Answer: Sampling and testing by EPA and its contractors is the primary means of monitoring compliance. EPA will supplement the field inspections with audits of any regulated facility during investigations of noncompliance to determine the full extent and source of violations, or based on any other indications of possible violations.

73. **Question:** How are EPA inspections conducted?

Answer: The authorized EPA inspectors will clearly identify themselves, present their credentials and state the purpose and nature of the inspection before beginning their procedure. Inspectors will make all reasonable efforts not to impede the normal conduct of business at the facility and will adhere to any local safety procedures if so requested. Generally, one sample per storage tank of finished product will be screened in the field for compliance. If the field screening test indicates a potential violation, a laboratory sample will be collected and analyzed in accordance with the regulatory procedure.

74. **Question:** What information can refiners and other regulated parties provide to expedite inspections?

Answer: At the start of an inspection, a party can advise EPA concerning applicable safety requirements for obtaining samples from the storage tanks. It can also provide information concerning the location, product quantities and type of storage tanks in which the finished product is stored (e.g., floating roof tank or fixed roof tank) and the type of gauge tubes that are used (perforated or solid). At the time of the inspection, a party should provide documentation and other evidence indicating whether product is blendstock or finished diesel fuel and the intended destination of the product.

75. **Question**: How will EPA inspect unmanned terminals that are entered with "keys" by various purchasers lifting products from common storage?

Answer: EPA will coordinate with the terminal owner/operator to gain access to the terminal and records relating to product stored at the terminal.

76. **Question**: Will EPA cooperate with other federal agencies when enforcing the diesel desulfurization regulations?

Answer: Yes. In the past, EPA has cooperated with other federal, state and local agencies when enforcing other motor vehicle fuels rules, such as under the lead phasedown and gasoline volatility programs. For example, EPA has conducted joint investigations, including search warrant inspections, with the Internal Revenue Service. EPA has also conducted joint inspections and audits with the U.S. Customs Service. EPA intends to use the same types of cooperative efforts, where possible, when enforcing the diesel desulfurization regulations.

NOTIFICATION OF VIOLATIONS

77. **Question**: What procedure will EPA follow to notify companies of violations; to resolve violations?

Answer: EPA generally will inform all identifiable parties who have potential liability when a field test indicates diesel fuel may be in violation of the standard. Inspectors will provide the person(s) in charge with fact sheets that address the specific findings and advise appropriate actions for the parties involved. If laboratory analysis confirms a violation, EPA will subsequently issue a Notice of Violation to the presumptively liable party(s) identifying the violation and setting forth a proposed penalty amount. Each party then may present additional facts and/or evidence to establish that the violation did not occur or to support a defense as set forth in the regulations. If a party meets its defense, EPA will drop the action. If not, EPA will attempt to negotiate a settlement with the party. If negotiations for settlement fail, depending on the nature and magnitude of the case, EPA will either initiate an administrative action, which affords the liable party an opportunity for a hearing before an administrative law judge, or refer the case to the Department of Justice with a recommendation that a complaint be filed in federal district court to recover the maximum statutory penalty.

78. **Question:** How quickly will EPA notify parties of violations?

Answer: EPA will inform the operator of the inspected facility immediately when field test results indicate noncompliance. If parties request, EPA will provide the results of laboratory tests as soon as completed. The Notice of Violation is issued as soon as possible after laboratory verification of the violation.

79. **Question:** What are the penalties for a diesel violation? Will the amount of a penalty take into account the sulfur level, cetane index and volume of product in violation?

Answer: The statutory penalty for violations of § 211 of the Clean Air Act, under the authority of which the diesel regulations are promulgated, is up to $25,000 per day per violation and the amount of the economic benefit or savings resulting from the violations. Although not yet complete, EPA's diesel penalties will likely be based upon the gravity of the violation (amount of sulfur over the standard or degree of deficiency in cetane index), the volume of product in violation, business size, and in certain cases, any history of prior violations.

REMEDIAL ACTION

80. **Question:** What should a party do if it discovers product not complying with the regulations during the course of an oversight program? How may a party remedy such a violation? Can the high sulfur fuel be transported or sold? Will EPA allow or require reblending? Will EPA close the facility? Will EPA initiate an enforcement action based upon the violation? Is the party required to notify EPA? What if the product is already downstream?

Answer: If at any time, whether in the course of an oversight program or through any other means, a regulated party discovers non-complying product, it should promptly take steps to remedy both the violation and the conditions which caused the violation. The nature of the remedial action will depend on the location and circumstances of the non-compliance. For example, if non compliance is found at a retail outlet or a WPC facility, the product should immediately be removed from sale or no longer dispensed for use in diesel motor vehicles. It would be appropriate to contact the fuel supplier and make arrangements to have the product removed or reblended into compliance. Similar actions would be appropriate if non-compliance were discovered at a terminal loading rack. The tank should be immediately closed from the loading rack, or the pumps turned off, and signs should be posted clearly identifying the tank as off-spec and unavailable for sale as on-highway fuel. The violation should be remedied by blending lower sulfur product with the high sulfur fuel and the tank then sampled to ensure that the product is in compliance before the tank is reopened for sale. If the tank cannot be blended into compliance, the product should be shipped to another facility, and/or designated for use as an off-highway fuel, and dyed in accordance with the regulations. If the non-compliance is discovered at a bulk storage facility, arrangements should be made to blend the product into compliance if feasible or the product redesignated as an off-highway fuel and dyed in accordance with the regulations. In any of the above scenarios, the regulated party should ascertain the cause of the violation and make efforts to prevent reoccurrence or its continuance. If any non-complying product has already been transported to a downstream facility, the regulated party should inform the downstream recipients of the non-complying product and take steps to recover the non-complying product or reblend it into compliance. Any efforts to remedy non-compliance should be documented and retained for review by EPA if necessary. At no time should a regulated party continue to transport or offer for sale or disperse a non-complying product as an on-highway fuel. The above are intended to be general guidelines, each case should be assessed individually.

Regulated parties are not required under the regulations to inform EPA of self identified non-compliance. However, if EPA discovers a violation such as those described above, and a regulated party has not initiated remedial actions, EPA will consider such inaction in determining the proposed penalty in any Notice of Violation.

EPA has no authority to require any of these remedial actions, or to close a facility. EPA may exercise its discretion and not initiate an enforcement action on the basis of high sulfur diesel fuel discovered by a regulated party if it has completely corrected the violation.

81. **Question**: What should a company do if it is notified that EPA has discovered a violation? Will any remedial action affect the penalty?

Answer: The company should immediately take remedial actions to correct the violation and the conditions which caused the violation (as described in the previous question). Such actions will be considered by EPA in partially mitigating any penalty imposed because of the violation.

82. **Question**: What will the Agency's procedure be for allowing (or not allowing) diesel sales when high sulfur fuel is indicated by the field test instrument?

Answer: When EPA inspectors inform a company that a diesel field test shows diesel fuel exceeds the sulfur standard, the Agency views this as notice to the company of a possible violation of the regulations. While the regulations do not give EPA the authority to stop the sale of non-complying product, if the EPA laboratory confirms the diesel fuel does not meet the standard, the company will be entitled to partial penalty mitigation only if appropriate remedial action was taken as soon as the company was told of the failed field test.

83. **Question:** What is the procedure to verify that a tank is back in compliance once corrective action has been taken?

Answer: Appropriate sampling and testing in accordance with the regulatory methods is the only means of ensuring compliance.